In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6160

JOHN ARTHUR BOYD, Petitioner,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge.*

Brief of Appellant

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STATEMENT OF FACTS

This is an appeal from an order of the United States District Court for the Western District of Washington, Southern Division, denying the petition of appellant for a writ of habeas corpus, who prayed to be discharged from custody and imprisonment under two sentences and commitments rendered

at different terms by separate courts, numbered respectively cause No. 11630 and cause No. 40011. Appellant contends that both sentences have been served.

In cause No. 11630 the appellant was sentenced on the 27th day of February, 1928, for violating Section 37 of the Penal Code, conspiracy to violate the Act of October 28, 1919, and Section 593 "A" of the Tariff Act of 1922, by Judge Bourquin in the District Court of the United States, Western District of Washington, Northern Division, to serve a term of fifteen months at hard labor in the United States Penitentiary at McNeil Island and to pay a fine of $1000.00. From this judgment and sentence an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit and affirmed.

In cause No. 40011 appellant, on the 15th day of March, 1929, entered a plea of guilty to violation of Section 37 of the Penal Code, conspiracy to violate the National Prohibition Act and Section 593 "A" of the Tariff Act of 1922, before Judge Webster in the District Court of the United States, Western District of Washington, Northern Division. On the same day the court sentenced appellant to be imprisoned

> "in the United States Penitentiary at McNeil Island, Pierce County, Washington, for the term of fifteen months at hard labor, said terms of im-

> prisonment to run consecutively and not concurrently with and in addition to the sentence heretofore imposed in a former cause."

On the 15th day of March, 1929, defendant was duly committed to the penitentiary on a commitment issued in cause No. 11630 and a commitment issued in cause No. 40011. *Both commitments were irregular.* The commitment in cause No. 11630 enlarged the sentence to this extent. The clerk added the following words to the said commitment:

> "and that he be further imprisoned in the same place until he shall have paid said fine or until he shall be discharged by law."

In cause No. 40011 the clerk did not correctly recite the sentence of the court in the said commitment. In fact he went much farther and attempted to make the sentence definite and certain by inserting the following language:

> "to run consecutively with and in addition to sentence imposed in cause No. 11630."

That by virtue of the provisions of Section 5544 Revised Statutes, a prisoner under sentence is entitled to a deduction on a sentence of fifteen months which would leave him a period of twelve months and one day to serve. The appellant has served considerably more than this period of time.

We contend that appellant has served both sentences. Our contention is based upon either one of two possible constructions of the two respective sentences and commitments. In our first contention, for the sake of argument, we will assume that the sentence and commitment in cause No. 11630 is correct but that the sentence rendered in cause No. 40011 by reason of the vague, uncertain, indefinite and unspecific words used, not stating any order of sequence, can only be construed as a sentence running concurrently with the sentence in cause No. 11630.

It is a well settled principal of law in criminal cases that where the court intends a sentence to be cumulative he must so state in words so specific that no confusion will appear. Keeping in mind the wording of this sentence

> "consecutively and not concurrently with and in addition to the sentence heretofore imposed in a former cause."

we call this court's attention to the following cases:

> "If the order in which the terms of imprisonment for the different offenses is to be served, is not clearly designated the terms are to be served concurrently, and the defendant cannot be held in further confinement under the sentence after the expiration of the longest term imposed. Cumulative sentences are permissible and in some cases are appropriate but when imposed on different

counts or indictments there must be certainty of the order of sequence."

Howard v. United States, 75 Fed. 986.

The logical reasoning in the following case is extremely applicable; *United States v. Patterson,* 29 Fed. 755:

> "The court do order and adjudge the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey, for the term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

Judge Bradley, in his very learned opinion, discussed and commented on the uncertainty of the sentence in this case in the following words:

> "The judgment of the district and circuit courts in criminal cases are final * * * and a mere error of law if in fact committed is irremediable; as much so as are the decisions of the Supreme Court. But if a judgment, or any part thereof, is void either because the Court that renders it is not competent to do so * * * (or) because it is senseless and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on habeas corpus."
>
> "If the prisoner is to be detained in prison for three successive terms neither he, nor the keeper of the prison, nor any other person, knows,

or can possible know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person would affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. * * * But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

The words used are undoubtedly equivalent to the words, "the said terms shall follow each other successively." But, if these words had been used, the case would not have been different. The inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sen-

tence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered."

This doctrine is well established in the Ninth Circuit in the following case:

Pucinelli v. United States, 5 Fed. 2nd, 6:

"Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments or on several counts in the same indictment, in the same court, each sentence begins to run at once and all run concurrently in the absence of some definite, specific provision that the sentence shall run consecutively, specifying the order of sequence."

See also *In Re Breton,* 93 Me. 30, 44 Atl. 125, 74 *A. L. R.,* 335; *In Re Hunt,* 28 Tex. App. 361, 13 S. W. 145.

In *Daugherty v. United States,* 2 Fed. (2nd), 691, the defendant was charged on three counts in one indictment with sale of narcotics. He plead guilty to all three counts and sentenced as follows:

"Be confined in the U. S. Penitentiary situated at Leavenworth, Kansas, for the term of five years on each of said three counts and until he shall have been discharged from said penitentiary by due course of law. Said term or imprisonment to run consecutively and not concurrently."

On petition for writ of habeas corpus the court had this to say:

> "Where sentence is imposed on verdicts of guilty or pleas of guilty, on several counts or on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provision that they be made to run consecutively by specifying the order of sequence."

However, this case was reversed in *United States v. Daugherty,* 269 U. S. 360, 70 L. Ed. 309. In this the Supreme Court, having reviewed the case and affirming the decision of the Circuit Court of Appeals down to the point of cumulative or concurrent sentences, thereupon says:

> "But we think it (C. C. A.) erred in holding that the sentence was only for 5 years.
>
> Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years, made of three five-year terms, one under the first count, one under the second, and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appear in the indictment. This is the reasonable and natural implication from the whole entry. The words "said term of imprisonment to run consecutively and not concurrently" are not consistent with the five-year sentence."

It must be remembered that this appellant was not tried on two counts of one indictment but was charged in two indictments by different grand juries and sentenced at separate terms of court by different judges.

It will be noted further in the opinion in the *Daugherty* case, supra, that the Supreme Court recognizes that cardinal rule established in the *Patterson* case supra, and approves it in the following language:

> "*United States v. Patterson,* supra, grew out of a sentence to pleas of guilty to three separate indictments. A single judgment entry directed that the prisoner 'be confined at hard labor in the state's prison of the state of New Jersey for a term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid.' The question there was materially different from the one here presented (*Daugherty* case) which concerns counts in one indictment. We think the reasoning in that opinion is not applicable to the present situation. *Neely v. United States,* Fourth C. C. A., 2 Fed. 2nd, 849, is more in point."

In the instant case we admit that it may have been the intention of the court to pronounce a sentence that might run consecutively with some other sentence but at this point we wish to call the court's attention to the fact that this appellant had previously been convicted in Oregon of an offense in the Federal Court

for which he had served a term of imprisonment in McNeil Island Penitentiary. We ask if the words

> "in addition to the sentence heretofore imposed in a former cause"

answer the requirements of the rule of certainty and sequence as laid down by the long line of decisions in criminal cases? We think not, for after a critical analysis of the language under discussion, no other conclusion seems possible than that it is uncertain, indefinite, unspecific and vague and only leads to the propounding of another question, namely, to what sentence and to what former cause does the court refer and which sentence is it to follow. In *Rice v. United States,* 7 Fed. 2nd, 319, the court pointed out that the word "consecutively" must be applied to something definite.

The fact that the clerk attempted in his commitment to erase from the warden's mind any confusion which might arise by reason of the wording of the said sentence does not help the situation in the least. A commitment should do nothing more or less than recite the sentence of the court. Indeed a certified copy of the sentence has been held to be sufficient authority for a warden to imprison and hold a person.

> "A certified copy of the sentence of a court of record is sufficient authority for the detention of a convict. No warrant or mittimus is necessary."
>
> *In re*: *Wilson,* 18 Fed. 33; 29 L. Ed. 89.

Suppose the clerk had in his commitment recited the words of the court

> "in addition to the sentence heretofore imposed in a former cause"

then we ask what construction could the warden have possibly made other than to construe the sentence to run concurrently with the commitment imposed in No. 11630, especially in view of the fact that the appellant was committed on the same day, to-wit: March 15, 1929, on the two commitments and further in view of the language of the commitment in No. 40011 which reads:

> "from and after this date."

In our second contention we will assume that the sentence and commitment in cause No. 40011 are sufficient in law but that the sentence imposed thereunder has been served for this reason: the commitment in cause No. 11630 is null and void and the same as if it had never been issued, by reason of the fact that it is not the sentence of the court. The clerk has enlarged the sentence of the court in his commitment by adding the words:

"and that he be further imprisoned in the same place until he shall have paid said fine or until he shall be discharged by law."

If these words are stricken from the commitment the defendant would have only fifteen months to serve, but if they are allowed to remain he must either pay the fine or be imprisoned sixteen months. If the court had intended that he be imprisoned until the fine was paid it is to be presumed that he would have embodied an order to that effect in his sentence.

"Where a fine is imposed the court may or may not imprison until the fine is paid; but, if it does imprison, the form of the sentence should be that the defendant be imprisoned until the fine is paid, or until he be otherwise discharged by due process of law, in view of this section."

Further quoting from the same opinion:

"Section 1041 authorizes imprisonment until the fine or penalty imposed be paid, and under that statute it is discretionary with the court whether or not it will order the defendants into custody until the same is paid."

Wagner v. United States, 3 Fed. 2nd, 864.

"Sufficiency—In General. The commitment not only should be authorized by the judgment of conviction on which it is based, but should be in accord therewith. However, a mittimus need not be any more minute or precise than the record of the judgment. If the conviction and commitment substantially agree with the judgment it

is sufficient. A commitment which is defective in matter of substance is void; * * * Where a commitment shows on its face that the conviction is invalid for duplicity and uncertainty it is void.

16 *Corpus Juris,* page 1329, Section 3122.

The warrant or order of commitment is simply an authority and direction to the marshal to take the prisoner to the penitentiary named. The copy furnished by the marshal or clerk to the warden is merely evidence, and evidence only, of the judgment and sentence of the court and the mittimus issued thereunder. The statute makes this evidence of a regular court judgment and mittimus sufficient authority and protection to the warden, and the warden is not required to go beyond this copy in satisfying himself of the existence of a valid sentence against the prisoner. This is the purpose and effect of the copy, and nothing more. The prisoner is not committed by virtue of the copy, but by virtue of the judgment of the court, and the mittimus issued pursuant thereto; the real valid authority under which the mittimus is issued being the sentence of the court."

Howard v. U. S., 75 Fed. 986.

In conclusion we respectfully submit under the first proposition which we have discussed no other interpretation is possible of the language contained in the sentence in cause No. 40011 than that the said sentence should be construed to run concurrently with the sentence imposed in cause No. 11630 or that it should run from the date the appellant was commit-

ted to the penitentiary, or, under the second proposition, that by reason of the fact that the commitment in cause No. 11630 is absolutely void because of a substantial variance with the sentence imposed in the same cause, that no other conclusion can be arrived at in view of the premises other than that the appellant should be discharged immediately from further imprisonment on the sentences imposed. We respectfully request the consideration of the court of the questions herein discussed to the end that justice be done the appellant.

Respectfully submitted,

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